Supreme Court, U.S.
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93-1077

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER, TERM, 1993

BURL KLINE
Petitioner,

v.

ATCHISON, TOPEKA & SANTA FE RAILWAY CO.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF KANSAS

Brian J. Niceswanger
McDowell, Rice & Smith
a Professional Corporation
7101 College Boulevard
Suite 200
Overland Park, KS 66210
(913) 338-5400

Richard F. Lombardo
McDowell, Rice & Smith
a Professional Corporation
120 West 12th Street
Suite 1300
Kansas City, MO 64105
(816) 221-5400

Jon G. Carlson *
Daniel J. Cohen
CARLSON, WENDLER & ASSOCIATES, P.C.
P. O. Box 527
#90 Edwardsville Professional Park
Edwardsville, Illinois 62025
(618) 656-0066

**Counsel of Record*

Attorneys for Petitioner

QUESTION PRESENTED

Whether a Federal Employers' Liability Act Plaintiff's one-time observation at his place of employment of a placard warning of the presence of a carcinogenic substance places him on notice, as a matter of law, that his subsequently diagnosed lymphatic cancer is work-related, such that his cause of action begins to accrue, as a matter of law, on the date of diagnosis?

PARTIES BELOW

All parties to the proceeding in the Court of Appeals of Kansas are identified in the caption.

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1. Existing Federal And State Case Authority Applying The "Discovery Rule" To Causes Of Action Brought Pursuant To The Federal Employers' Liability Act Lacks Sufficient Uniformity To Ensure Consistent Results In Summary Judgment Proceedings. Since This Court Is The Final Authority On The Statutory Construction Of The Federal Employers' Liability Act, It Should Provide Guidance As To The Proper Analysis And Resolution Of This "Discovery Rule" Issue, Thereby Reinstating The Uniformity And Consistency Which This Court Has Long Espoused In Such Cases. 7

2. The Trial Court's Reliance On The Seventh Circuit's Restrictive Construction And Application Of The "Discovery Rule" Served To Deny Petitioner His Federally Guaranteed Substantive Right Under The F.E.L.A. To Have The Material Issues Of Fact In His Case Resolved By A Jury. Since This Court Is The Final Authority On The Statutory Construction Of The F.E.L.A., And In Light Of The General Importance Of The Issue At Bar To Countless Pending And Future Cases, This Court Should Grant Certiorari To Rectify The Error Committed Below 13

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OPINIONS BELOW

The order of the Supreme Court of Kansas denying discretionary review, which is unreported, is appended hereto at page A-1. The opinion of the Kansas Intermediate Appellate Court, which is unpublished, is appended hereto at page A-2. The order of the Wyandotte County District Court, State of Kansas, is appended hereto at page A-18.

JURISDICTION

The order of the Supreme Court of Kansas denying discretionary review of the judgment of the Kansas Intermediate Appellate Court was entered September 28, 1993. The judgment of the Kansas Appellate Court was entered July 2, 1993. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

45 U.S.C. § 51 (1939)

"Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees:

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury of death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any party of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in

such commerce and shall be considered as entitled to the benefits of this chapter.

45 U.S.C. § 56 (1988)

"Actions; limitations; concurrent jurisdiction of courts"

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

STATEMENT OF THE CASE

The Evidence

Petitioner, Burl Kline, was employed by Respondent, Atchison, Topeka & Santa Fe Railway Company, as a carman from 1956 to 1988, at which time he took medical retirement (A-3). During his employment, Petitioner was exposed - on an almost daily basis - to various chemicals, including vinyl chloride, polyvinyl chloride, radioactive materials, diesel exhaust, PCB, benzene, lead, formaldehyde, asbestos, carbon black, potash, ammonia nitrate, anhydrous ammonia, styrene, and herbicides including 2, 4-D and 2, 4, 5-T (A-3). Petitioner was exposed to many of the forgoing substances up to the last day of his employment (A-3).

Petitioner was given virtually no instructions regarding safe handling of the above-described chemicals (A-3). Although Petitioner frequently complained to Respondent's management personnel about working in or around such chemicals, he was

ignored (A-4). In fact, Respondent regularly discouraged Petitioner, and similarly situated employees, from reading warning placards on rail cars (A-4). Petitioner described Respondent's conduct in this regard as an indoctrination, "because if you don't know what it is, then you don't have so many problems" (A-14).

On one occasion, Petitioner was told by a supervisor not to worry about vinyl chloride in its solid state, notwithstanding the presence of a warning placard to the contrary (A-4). In fact, Respondent's own environmental library contains documents dating back to 1978 which indicate that vinyl chloride can cause lymphatic cancer and that there are no known safe levels of exposure to it. On another occasion, Petitioner hesitated to clean out a car which had a radioactive warning placard attached. In response, Petitioner's supervisor removed the placard and instructed him to clean the car anyway (A-4).

During his deposition, Petitioner testified that he had *once* observed a placard referring to the carcinogenic nature of polyvinyl chloride (A-4). This placard was underneath the sidesill on a polyvinyl chloride car and, according to Petitioner, "you've got to be looking for it to find it". Other than this one placard, there is no other reference in the record to any warning on the part of Respondent concerning the fact that Petitioner, and others similarly situated, were being exposed to cancer causing agents.

In 1984, Petitioner was diagnosed with non-Hodgkin's lymphoma following removal of a swollen lymph gland (A-2). Although Petitioner had periodically suffered from swollen lymph nodes between the late 1960's and 1984, his physician had assured him that such swelling was due to infection or inflammation. Petitioner was given no indication, before or after 1984, that the swelling was in any way work-related.

Petitioner testified that he did not suspect his work-related exposure to chemicals as a cause of his cancer until June, 1990, when he read a Kansas City Star newspaper article linking exposure to 2, 4-D and 2, 4, 5-T to the onset of non-Hodgkin's lymphoma

(A-5). Upon reading the article, Petitioner asked his physician whether there was a causal connection between his chemical exposure and his cancer. The physician initially responded that "it can cause it", but then conceded that he did not know (A-5).

On August 13, 1991 - less three years after his last day of employment with Respondent, Petitioner filed suit against Respondent pursuant to the Federal Employers' Liability Act (hereinafter, "F.E.L.A."), 45 U.S.C. § 51, *et seq.*, alleging that Respondent had negligently exposed him to hazardous materials which caused his cancer (A-5). On September 1, 1992, the trial court granted summary judgment in favor of Respondent on the ground that the three-year statute of limitations applicable to Petitioner's cause of action had expired prior to Petitioner's filing of his case (A-5). In so doing, the trial court rejected three different theories submitted by Petitioner in support of the proposition that the statute of limitations had been tolled until 1990.

First, the court rejected Petitioner's attempted invocation of the "discovery rule" (A-28). Although acknowledging the "diversity among the circuits" regarding the proper application of the rule (6/12/92, Tr.22), and conceding that Petitioner "would stand a considerable chance in front of a jury" (6/12/92, Tr. 28), the court nevertheless held as a matter of law that Petitioner had a duty, in 1984, to investigate the cause of his cancer and that, if he had fulfilled that duty, he would have learned of the causal connection between his chemical exposure and his cancer (A-28). Alternatively, the court held that Petitioner's knowledge of contact with known carcinogens as a matter of law negated the applicability of the discovery rule to the case at bar. In reaching each of the foregoing conclusions, the court openly admitted that it perceived no relevant distinction between a "could have known" standard and a "should have known" standard in the proper application of the discovery rule (8/6/92, Tr. 15). Second, the court rejected Petitioner's contention that Respondent was estopped to assert the statute of limitations defense by virtue of its fraudulent concealment of his cause of action (A-29). Finally, the court rejected Petitioner's "continuing tort" theory (A-28).

The Kansas Court of Appeals affirmed the lower court's judgment. In affirming, the appellate court addressed each of the three positions espoused by Petitioner before the lower court. With regard to the "discovery rule", the appellate court specifically rejected the trial court's reasoning that a reasonable inquiry of the medical community by Petitioner in 1984 would have disclosed the work-related nature of his cancer. Nevertheless, the appellate court held:

> [S]ince the testimony concerning the impact of the doctor's counsel is equivocal, summary judgment could only be justified on the basis of [Petitioner's] admitted knowledge of contact with known carcinogens. We believe it is (A-13).

In other words, the court held that Petitioner's one-time observation of a warning placard on a polyvinyl chloride car placed him on notice, as a matter of law, that (1) he had come into contact with known carcinogens, and (2) his as-yet-unmanifested lymphatic cancer was causally related to this carcinogenic exposure. On this basis alone, the appellate court found the discovery rule inapplicable to the facts of Petitioner's case, and ruled that the statute of limitations in Petitioner's case expired three years from the date of diagnosis.

Thereafter, the court disposed of Petitioner's two remaining theories - fraudulent concealment and continuing tort - on the ground that Petitioner's "admitted knowledge of contact with known carcinogens" negated the applicability of either proposed approach (A-14/16).

Petitioner's prayer for discretionary review in the Supreme Court of Kansas was denied (A-1).

How Federal Question Was Presented

In the first instance, Petitioner raised the federal question at issue by response to Respondent's Motion For Summary Judgment. Petitioner again raised the question in the Kansas Court of Appeals, seeking reversal of the trial court's entry of summary judgment in favor of Respondent. Petitioner's ultimate prayer for discretionary review by the Kansas Supreme Court was denied.

REASONS FOR GRANTING THE WRIT

I. EXISTING FEDERAL AND STATE CASE AUTHORITY APPLYING THE "DISCOVERY RULE" TO CAUSES OF ACTION BROUGHT PURSUANT TO THE FEDERAL EMPLOYERS' LIABILITY ACT LACKS SUFFICIENT UNIFORMITY TO ENSURE CONSISTENT RESULTS IN SUMMARY JUDGMENT PROCEEDINGS. SINCE THIS COURT IS THE FINAL AUTHORITY ON THE STATUTORY CONSTRUCTION OF THE FEDERAL EMPLOYERS' LIABILITY ACT, IT SHOULD PROVIDE GUIDANCE AS TO THE PROPER ANALYSIS AND RESOLUTION OF THIS "DISCOVERY RULE" ISSUE, THEREBY REINSTATING THE UNIFORMITY AND CONSISTENCY WHICH THIS COURT HAS LONG ESPOUSED IN SUCH CASES.

Within the context of F.E.L.A. causes of action, this Court has repeatedly espoused the overriding importance of maintaining uniformity and consistency in the application of the Act's provisions to cases arising thereunder. *Burnett v. New York Central R.R. Co.*, 380 U.S. 424 (1965). However, notwithstanding such controlling pronouncements of this Court directed to both state and federal tribunals, a broad diversity of case authority has

developed regarding the meaning of the "discovery rule" as applied to the F.E.L.A's three-year statute of limitations (45 U.S.C. § 56).

On the one hand, some courts have adhered to an approach to the "discovery rule" which acknowledges the fact-intensive nature of the inquiry and its required resolution by the trier-of-fact. Exemplary of this approach is *Dubose v. Kansas City Southern Ry. Co.*, 729 F.2d 1026 (5th Cir. 1984), wherein it was held:

> When a plaintiff may be charged with awareness that his injury is connected to some cause *should depend on factors* including how many possible causes exist and whether medical advice suggests an erroneous causal connection or otherwise lays to rest a plaintiff's suspicion regarding what caused his injury. *Id.* at 1021 (emphasis added).

More recently, the Missouri Court of Appeals has taken a similar approach to the "discovery rule" issue, holding:

> The issue of when plaintiff knew or should have known of his injury and its cause is a *question of fact for the jury.*
>
> In the case of actual knowledge, the cause of action accrues when the character of the condition and its cause first "c[o]me together" for the plaintiff. *The "should have known" test is not narrowly confining. The test is not a "could have known" test. Rather, it requires a very substantial common-sense likelihood that a reasonably careful person would discover the existence of the injury and its cause. Plaintiffs are entitled to wait until the cause has been rationally identified.* *Rogers v. Illinois Central R.R.Co.*, 833 S.W.2d 426, 428 (Mo.App. 1992)(emphasis added) (all citations omitted).

Perhaps the most liberal construction of the F.E.L.A. discovery rule, however, is found in *Aerojet-General Shipyards, Inc. v. O'Keeffe*, 413 F.2d 793 (5th Cir. 1969), in which the court, discussing this Court's decision in *Urie v. Thompson*, 337 U.S. 163 (1949), stated:

> The [Supreme] Court considered occupational disease cases as a special category and noted that the statute of limitations could only begin to run when the employee has *definite knowledge that his injury or disease is work-related. O'Keeffe*, 413 F.2d at 796, n.4 (emphasis added).

The Tenth Circuit United States Court of Appeals has also adopted a similar, liberal approach to the discovery rule in the toxic tort context. In *Maughan v. Southwest Servicing, Inc.*, 758 F.2d 1381 (10th Cir. 1985), the court noted:

> Because of the complexity of scientific data concerning causation of cancer, the disparity of knowledge between plaintiffs and potential defendants, and the often long latency period of the disease, this Court concludes that *cases involving suspected carcinogens present "exceptional circumstances" justifying application of the discovery rule* . . . .
>
> There are many suspected causes of cancer, many of which are natural or non-negligent and would not give rise to a legal cause of action. *Thus a potential plaintiff, on learning that he has cancer, lacks the usual incentive to investigate the possibility that the known injury may give rise to a legal claim.* In addition, even if he attempts to determine the cause of the disease, he is confronted with a mass of complex, controversial and rapidly changing scientific data and opinions . . .. *Id.* at 1384-85 (emphasis added).

The *Maughan* court went on to discuss the policy concerns militating against restrictive application of the discovery rule, observing:

> To adopt a rule that encourages the filing of lawsuits when one develops cancer but has no knowledge of its cause, *or which have several possible causes* "is not consistent with the unarguably sound proposition that *unfounded claims should be strongly discouraged.*" (citation omitted).
>
> In this time of crowded dockets, it is pure folly to suggest that the plaintiff should file suit against all sources of suspected carcinogens, with the *impact in economic and social costs,* simply to prevent the running of the statute of limitations.
>
> In addition, to hold that the statute begins to run at the time the cancer first develops would *encourage the government and the private parties who have relevant information to delay disclosure until after the statute has run,* leaving the plaintiffs with no opportunity to raise their claims. *Id.* at 1386 (emphasis added).

See also, *Curry v. Consolidated Rail Corp.*, 766 F.Supp. 380 (W.D.Penn. 1991), *Corrigan v. Burlington Northern R.R., Inc.*, 612 F.Supp. 665 (D.Minn. 1985), and *Hatfield v. Burlington Northern Ry. Co.*, 747 F.Supp. 634 (D.Kan. 1990) (all holding that the issue of when a cause of action accrues is a matter for the jury).

At the other extreme is a line of authority issuing from the Seventh Circuit United States Court of Appeals. These precedents discuss the F.E.L.A. discovery rule in terms wholly inconsistent with the above-cited caselaw, and it is clear that courts adhering to this Seventh Circuit decisional law perceive a substantially broader

judicial role in the resolution of discovery rule issues as a matter of law. Thus, the court in *Fries v. Chicago & Northwestern Transp. Co.*, 909 F.2d 1092 (7th Cir. 1990), held that "[t]he tolling permitted by *Urie* only extends the limitations period to the date when the injury manifests itself, *not beyond*". *Id.* at 1095 (emphasis added). Further, the *Fries* court specifically rejected the *Maughan* and *Dubose* courts' concern, *supra*, as to how many potential causes of injury exist, holding instead that "the injured plaintiff need not be certain which cause, if many are possible, is the governing cause, but only need know or have reason to know of a potential cause". *Fries*, 909 F.2d at 1095. The *Fries* opinion even suggests that an injured employee's inability to ascribe his injury to a non-work-related cause should reasonably lead the employee to the inferential conclusion that the actual cause of injury *is* work-related, thus triggering the statute of limitations. *Id.* at 1094. And, notably, this entire Seventh Circuit framework for resolution of discovery rule issues is premised upon a view that the discovery rule focuses on what an injured employee "*could have discovered*", *Nemmers v. United States*, 795 F.2d 628 (7th Cir. 1986), rather than on what he "*should have known*". *Rogers, supra.*

Moreover, this split of authority as to the proper meaning and application of the discovery rule is not merely semantical. To the contrary, it is clear that the varying definitions and terminologies adopted by the above-referenced courts (and others) inconsistently affect the substantive rights of the F.E.L.A. litigants appearing before them. For example, a Missouri appellate court has held that an F.E.L.A. hearing loss claimant's deposition admission - that more than three years before filing suit he "figured that it was maybe the noise that was doing it" - was insufficient to warrant summary judgment on the statute of limitations issue. *Kestner v. Missouri Pacific R.Co.*, 785 S.W.2d 646 (Mo.App. 1990); Yet the Seventh Circuit has held that a claimant's mere awareness, in 1981, that he was experiencing some diminishment in his hearing capacity, warrants summary judgment where the cause of action was not filed within three years of that date. *Fries v. Chicago & Northwestern Transp. Co.*, 909 F.2d 1092 (7th Cir.

1990). This obvious and irreconcilable lack of uniformity in the construction and application of the F.E.L.A. discovery rule is interfering with the substantive rights of countless F.E.L.A. litigants in general, and has prejudiced *Petitioner's* substantive rights in particular.

In Petitioner's case, both the trial and appellate courts relied heavily on Seventh Circuit precedent in concluding that Petitioner's cause of action was time-barred. In its opinion, the Kansas appellate court candidly acknowledged that the only record evidence supportive of this finding was limited to Petitioner's "admitted knowledge of contact with the known carcinogens"; i.e, his one-time reading of a warning placard on a railcar. Nevertheless, under the standard espoused by the Seventh Circuit, the court determined that this single event was sufficient to place Petitioner on notice of the likely cause of his as-yet-unmanifested cancer so as to preclude the protection otherwise afforded by the discovery rule. Petitioner respectfully submits that this result is wholly inconsistent with the majority of case holdings from other jurisdictions, some of which have been cited above.

Accordingly, if the Seventh Circuit's approach to the discovery rule constitutes an improper restriction upon an F.E.L.A. claimant's right to have a jury resolve the statute of limitations issue, then Petitioner and countless others have been wrongfully deprived of their substantive remedy under the F.E.L.A. On the other hand, if the Seventh Circuit has correctly identified the construction and application to be given to the F.E.L.A. discovery rule, then railroad defendants being sued in Missouri, the Fifth and Tenth Circuits, and other jurisdictions adhering to similarly liberal constructions of the discovery rule, are improperly being forced to defend causes of action which should have been terminated by grant of summary judgment. Because this Court is the final authority on the proper meaning and application of the F.E.L.A., it should grant certiorari to clarify the law relating to the discovery rule, thereby resolving the split of authority described above and providing needed guidance to courts encountering this issue in the future.

II. THE TRIAL COURT'S RELIANCE ON THE SEVENTH CIRCUIT'S RESTRICTIVE CONSTRUCTION AND APPLICATION OF THE DISCOVERY RULE SERVED TO DENY PETITIONER HIS FEDERALLY GUARANTEED SUBSTANTIVE RIGHT UNDER THE F.E.L.A. TO HAVE THE MATERIAL ISSUES OF FACT IN CASE RESOLVED BY A JURY. SINCE THIS COURT IS THE FINAL AUTHORITY ON THE STATUTORY CONSTRUCTION OF THE F.E.L.A., AND IN LIGHT OF THE GENERAL IMPORTANCE OF THE ISSUE AT BAR TO COUNTLESS PENDING AND FUTURE CASES, THIS COURT SHOULD GRANT CERTIORARI TO RECTIFY THE ERROR COMMITTED BELOW

As discussed above, and as candidly acknowledged by the trial court in the case at bar, there is a split of authority as to the proper construction and application of the F.E.L.A. discovery rule. As also discussed above, this split of authority has resulted in a lack of uniformity and consistency in the resolution of discovery rule issues in cases brought under the F.E.L.A. It is Petitioner's position that the reliance by the courts in the instant case upon the Seventh Circuit's restrictive construction and application of the discovery rule constitutes error, and that this error has resulted in a denial of Petitioner's guaranteed right to have the material issues of fact in his case resolved by a jury.

In this regard, it must be kept in mind that trial by jury was specifically intended to be part of the F.E.L.A.'s broad remedial scheme. *Boeing Company v. Shipman,* 411 F.2d 365, 371 (5th Cir. 1969)("It is clear that the congressional intent in enacting F.E.L.A. was to secure jury determinations in a larger proportion of cases than would be true in ordinary negligence actions. In other words, trial by jury is part of the remedy in F.E.L.A. cases"). Thus, in F.E.L.A. cases, a trial court is required to take a particularly liberal view of the scope of permissible inferences open to the jury. *Chicago & Great Western Ry. Co. v. Smith,* 228 F.2d

180, 182 (8th Cir. 1955). Conversely, it is *not* the function of the trial judge to weigh the evidence in making his findings of fact or conclusions of law. *Agristor Leasing v. Farrow*, 826 F.2d 732 (8th Cir. 1987).

Yet this is exactly what the trial and appellate courts, relying on Seventh Circuit precedent, did in the case at bar. Utilizing a "could have known" standard derived from *Nemmers v. United States*, 795 F.2d 628 (7th Cir. 1986), the courts improperly weighed the record evidence in order to ascertain whether Petitioner *could have known* the work-related nature of his cancer upon diagnosis. After disregarding the evidence demonstrating Respondent's blatant concealment of the toxic hazard to which it had exposed Petitioner, and focusing *solely* upon Petitioner's admission that he had, on one occasion, observed a "carcinogenic warning" on a railcar, the courts concluded that Petitioner *could have known* of the cause of his cancer in 1984 and, therefore, that there was no tolling of the statute of limitations. Petitioner submits that both this reasoning, and the result, are untenable.

With regard to the proper standard for discovery rule application, the previously cited authorities are clear that the test is what the injured employee *should have known*, not what he *could have known*. This is not only well-established in law, but it is logical as well. The "should have known" test focuses on the *probabilities* associated with reasonable human conduct. Under this test, a trial court will seldom be acting within its discretion in resolving discovery rule issues as a matter of law. Dissimilarly, the "could have known" test diverts the judicial focus to the *possibilities* associated with reasonable human conduct. Applying this standard, a trial court enjoys broad discretion to engage in unfettered speculation as to a given plaintiff's imputed level of knowledge about the cause of his injury. Such an approach obviously frustrates not only the general underlying purpose of the discovery rule as a tool of equity, but also the specific mandate that F.E.L.A. cases be resolved by juries to the greatest extent possible.

In the case at bar, it is clear that Petitioner's justified expectations under the F.E.L.A. have been frustrated. At the trial level, the court openly admitted to the substantial likelihood that a jury, hearing Petitioner's discovery rule issue, would resolve the matter in Petitioner's favor. Subsequently, on appeal, the court acknowledged that the factual record "seems to indicate that [Petitioner's] case should have gone to the jury" (A-10). In fact, even applying the unduly restrictive standard espoused by the Seventh Circuit, the appellate court was forced to concede that "[t]he present case is a difficult one" (A-12). Nevertheless, owing to this improper construction of the discovery rule, which permits - and even requires - a court to draw speculative inferences prejudicial to the injured party's position, both the trial and appellate courts in the present case ruled that Petitioner was *not* entitled to a jury determination of his case. To say the least, this result cannot be reconciled with the fundamental principles upon which the F.E.L.A. is premised, nor can it be construed harmoniously with the better-reasoned precedents from the Fifth Circuit, the Tenth Circuit, Missouri, and other jurisdictions, *supra*.

With the foregoing in mind, Petitioner submits that the issue at hand is ripe for review. On the one hand, there is a split of authority relating to an issue of necessary uniformity, and this split of authority has now become even more profound in that the Kansas judiciary has adopted the restrictive view endorsed by the Seventh Circuit. On the other hand, Petitioner himself has suffered a total deprivation of his federally guaranteed remedy under the F.E.L.A.; i.e., he is an aggrieved party with a very substantial interest in the proper resolution of the above issue. These factors justify Petitioner's prayer for certiorari. This Court's intervention and guidance are therefore requested.

CONCLUSION

For the reasons stated herein, certiorari should be granted.

Respectfully submitted,

Brian J. Niceswanger, #12531
McDowell, Rice & Smith
a Professional Corporation
7101 College Boulevard
Suite 200
Overland Park, KS 66210
(913) 338-5400

Richard F. Lombardo
McDowell, Rice & Smith
a Professional Corporation
120 West 12th Street
Suite 1300
Kansas City, MO 64105
(816) 221-5400

JON G. CARLSON*
DANIEL J. COHEN
CARLSON, WENDLER & ASSOCIATES, P.C.
90 EDWARDSVILLE PROFESSIONAL PARK
EDWARDSVILLE, ILLINOIS 62025
(618) 656-0066

Attorneys for Petitioner,
Burl Kline

*Counsel of Record

APPENDIX

APPENDIX A

IN THE SUPREME COURT

OF THE STATE OF KANSAS

JON G. CARLSON
P.O. BOX 527
EDWARDSVILLE, IL 62025

BURL KLINE,
APPELLANT,

V NO. 92-68-663-AS

ATCHISON, TOPEKA & SANTA FE
RAILWAY COMPANY,
APPELLEE.

You are hereby notified of the following action taken by the Court:

Petition For Review by Appellant, Burl Kline.
Denied.

Date: 09/28/93.

Carol G. Green
Clerk

APPENDIX B

No. 98,663

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

BURL KLINE,
Appellant,

v.

ATCHISON, TOPEKA & SANTA FE RAILWAY CO.,
Appellee.

MEMORANDUM OPINION

Appeal from Wyandotte District Court; WILLIAM M. COOK, judge. Opinion filed July 2, 1993. Affirmed.

Michelle M. Suter and *Richard F. Lombardo*, of McDowell, Rice & Smith, of Overland Park, Kansas, and *Jon Carlson*, of Edwardsville, Illinois, for appellant.

Douglas M. Greenwald and *William P. Coates, Jr.*, of McAnany, Van Cleave & Phillips, P.A. of Lenexa, for appellee.

Before PIERRON, P.J., RULON, J., and KAREN M. HUMPHREYS, District Judge, assigned.

PIERRON, J.: In a case arising under the Federal Employer's Liability Act (FELA), 45 U.S.C. §§ 51 et seq. (1988), Burl Kline (plaintiff-appellant) appeals from the district court's grant of summary judgment in favor of his employer, the Atchison, Topeka & Santa Fe Railway Company (Santa Fe).

Kline is suffering from non-Hodgkin's lymphoma, which was first diagnosed in 1984. Kline filed suit in 1991, alleging Santa

Fe negligently exposed Kline to various carcinogenic chemicals. Kline sought damages in excess of $10,000.

The district court granted Santa Fe's motion for summary judgment. The court ruled that the FELA three-year statute of limitations had expired prior to the commencement of the action, and, consequently, Kline's suit was time barred. In an extensive memorandum decision, the district court ruled that Kline knew or should have known, upon diagnosis of his condition, that his illness could have been caused by exposure to chemicals while working at Santa Fe and was, therefore, time barred.

The undisputed facts upon which the decision was made are as follows: Burl Kline worked for Santa Fe almost continuously following his graduation from high school in 1956 until he took medical retirement in 1988. Kline stated that, during his employment, he was exposed to various chemicals, some on an almost daily basis. Kline testified that in his job as a carman he was asked to work on rail cars which either contained or had recently contained chemicals. Residue of the chemicals often saturated Kline's clothing and work gloves. He stated he often had to crawl under rail cars to do his job and, in the process, had to work while kneeling or standing in substances which had been dumped upon the ground. Kline stated he was exposed to the following: vinyl chloride, polyvinyl chloride, radioactive materials, herbicides including 2, 4-D and 2, 4, 5-T, diesel exhaust, PCB, benzene, lead, formaldehyde, asbestos, carbon black, potash, ammonia nitrate, anhydrous ammonia, and styrene.

He was exposed to many of the foregoing substances up to the last day of his employment.

Kline testified he was given virtually no instructions regarding safe handling of the chemicals, nor was he given sufficient protective gear.

Kline stated that stenciled health warnings appeared on certain cars, some specifically warning that the substances contained therein were known cancer-causing agents.

Kline also stated he suffered some health problems which he recognized as probably work related. On numerous occasions he suffered from severe itching on his arms. He attributed the itching to exposure to week killers. Kline also coughed up blood during the winter months. He attributed that to being exposed to diesel fumes and smoke in unventilated buildings.

Kline stated he also suffered from swollen lymph nodes, a condition which at times lasted up to a week. That condition began in the late 1960s and reoccurred periodically until he was diagnosed in 1984 with non-Hodgkin's lymphoma following removal of a swollen lymph gland.

Prior to being diagnosed, Kline's physician told him the lymph node swelling was due to infection or inflammation. He stated his physicians did not indicate to him that the swelling was work related.

Kline stated he frequently complained about working in or around the chemicals. He stated he told different supervisors but that they "didn't want to hear about them." Kline testified that employees were discouraged from reading the warning placards on the rail cars. He stated he was told by a supervisor not to worry about vinyl chloride in its solid state because it was only dangerous as a gas. Later the supervisor told Kline that the warning placard regarding vinyl chloride did, perhaps, mean something.

Kline further testified that on one occasion he hesitated to clean out a car which had a radioactive warning placard attached. The supervisor removed the placard and had him clean the car.

Kline also testified he routinely checked the stenciled warnings on the cars, apparently because he was hesitant to work on the cars without knowing what was in them.

Kline testified he did not suspect his exposure to the chemicals as a cause of his cancer until June 1990 when he read a Kansas City Star newspaper article linking exposure to 2, 4-D and 2, 4, 5-T with the onset of non-Hodgkin's lymphoma.

Upon reading the newspaper article, Kline asked his physician whether or not there could be a link between Kline's exposure to chemicals at work and his lymphoma. In his brief on appeal, Kline states his physician replied that he did not know. That characterization of the physician's answer may not be entirely accurate. In his deposition, Kline stated first that his physician told that such exposure could cause the cancer. Kline then stated his physician told him he did not know regarding the possible link.

On August 13, 1991, Kline filed suit against Santa Fe alleging the railroad had negligently exposed him to hazardous materials resulting in his lymphoma.

In granting Santa Fe's motion for summary judgment, the district court held that plaintiff's claim accrued at the time he first became armed with the critical facts of both the existence and cause of his injury. The statute commenced to run "when a reasonable person would know enough to prompt a deeper inquiry into a potential cause." *Nemmers v. U.S.*, 795 F.2d 628, 632 (7th Cir. 1986).

The court determined Kline had the same knowledge in 1984, when first diagnosed, as he did in 1990. Kline's complaints to his supervisors and his admission that he kept himself apprised of what chemicals were in the cars was sufficient evidence that Kline knew or should have known of the cause of his injury. His failure to investigate the potential cause of his injury, the court concluded, should not be borne by Santa Fe.

The court granted Santa Fe's motion for summary judgment, and Kline timely appeals.

The most important issue to resolve is whether the court erred in finding that Kline should have known of the possible link between his cancer and his occupational exposure to chemicals, which required him to seek expert guidance as to the cause of his cancer when it was diagnosed.

Kline contends the district court erred in ruling he should have known that exposure to work-place chemicals caused his cancer. Specifically, he contends this issue is one that must be resolved by a jury.

Santa Fe contends the court ruled properly because Kline's claim was time barred as a matter of law.

> "Summary judgment is proper where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The trial court is required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought. On appeal, we read the record in the light most favorable to the party who defended against the motion for summary judgment, and where we find reasonable minds could differ as to the conclusions drawn from the evidence, summary judgment must be denied. [Citations omitted.]
>
> "Where the affirmative defense of the statute of limitations is asserted, summary judgment may be proper where there is no dispute or genuine issue as to the time when the statute commenced to run. But in a tort action where the evidence is in dispute as to when substantial injury first appears or becomes reasonably ascertainable, the issue is for determination by the trier of fact. [Citations

omitted.]" *Gilger v. Lee Constr., Inc.*, 249 Kan. 307, 311, 820 P.2d 390 (1991).

FELA cases are statutory negligence actions. See *Boeing Company v. Shipman*, 411 F.2d 365, 370, (5th Cir. 1969). Two additional elements should also be noted in considering this court's scope of review. First, "it is clear that the congressional intent in enacting the FELA was to secure jury determinations in a larger proportion of cases than would be true of ordinary common law actions. . . .'[T]rial by jury is part of the remedy' in FELA cases." 411 F.2d at 371. "[T]he right of the jury to pass upon the question of fault and causality must be most liberally viewed." *Chicago, Rock Island and Pacific Railroad Co. v. Melcher*, 333 F.2d 996, 999 (8th Cir. 1964).

Second, FELA actions impose on the plaintiff not the burden of proving fault by a preponderance of the evidence, but rather the burden of showing only *slight* negligence. *Missouri-Kansas-Texas Railway Company v. Hearson*, 422 F.2d 1037, 1040 (10th Cir. 1970); *Lane v. Gorman*, 347 F.2d 332 (10th Cir. 1965).

No action may be maintained under FELA unless commenced within three years from the day the cause of action accrued. 45 U.S.C. § 56 (1988).

The district court specifically found:

> "[Kline] knew of the nature and extent of his exposure to hazardous chemicals which should have caused a reasonably diligent person to suspect that such exposure was a potential cause of his disease. [Kline] had a duty to investigate potential causes and he admittedly failed to ask anyone, including his treating physician, whether there was a causal connection between the exposure and his illness. An investigation would have led to a discovery of causation because medical science recognized a causal connection between chemical

> exposure and non-Hodgkin's lymphoma long before the filing of [Kline's] action."

The United States Supreme Court established the "discovery rule" in the context of negligence cases in *Urie v. Thompson*, 337 U.S. 163, 170, 93 L. Ed. 1282, 69 S. Ct. 1018 (1949). The rule was restated in *United States v. Kubrick*, 444 U.S. 111, 62 L.Ed.2d 259, 100 S.Ct. 352 (1979). There the Court determined that a plaintiff's claim accrues at the time he is "armed with the facts about the harm done to him" and should diligently seek advice regarding causation. 444 U.S. at 123.

Kline relies heavily upon *Maughan v. SW Servicing, Inc.*, 758 F.2d 1381 (10th Cir. 1985). Although Maughan differs somewhat from the present case in that it construes a Utah statute of limitations rather than FELA, the case does concern a claim involving suspected carcinogens.

In *Maughan*, the plaintiffs filed a wrongful death suit, alleging that the leukemia which led to the deaths of their children and spouses between 1960 and 1973 was caused by radiation emanating from a nearby uranium processing plant. The trial court granted defendant's motion for summary judgment as to certain plaintiffs on the ground that Utah's two-year statute of limitations for wrongful death actions had run. 758 F.2d at 1383.

The plaintiffs, on appeal, argued that statute was tolled until they first discovered that the leukemia may have been caused by radiation emanating from the plant.

The Tenth Circuit noted that the discovery rule may apply to toll the statute of limitations until discovery of the injury and its causation in latent disease and medical malpractice cases. 758 F.2d at 1385 n.3. "The application of the discovery rule is based on a balancing of the hardship the statute of limitations would impose on the plaintiff against the difficulties of proof caused by the passage of time." 758 F.2d at 1384.

In *Maughan*, contrary to the present case, some of the plaintiffs moved from the plant's locale prior to or immediately after the diagnoses of their disease. 758 F.2d at 1386. In the present case, prior to being diagnosed, Kline worked with chemicals for three to four years following his diagnosis. In *Maughan*, plaintiffs' physicians told them that the cause of the disease was unknown. 758 F.2d at 1386. In the present case, Kline testified that at the time of his diagnosis, he neither asked his physician nor did the physician offer an opinion as to whether the lymphoma could be work related. Kline stated, however, that, after he read the Star article in 1990, he asked his physician whether a link might exist. Kline's physician replied that he did not know.

In *Maughan*, the court stated the link between low-level radiation and cancer remains controversial among experts. 758 F.2d at 1386. In our case, Kline admitted to noticing the placards on various rail cars warning of possible carcinogenic materials. The first information Kline obtained linking specific substances he was exposed to (2, 4-D and 2, 4, 5-T) with non-Hodgkin's lymphoma was the 1990 Star newspaper article. Kline's expert witness, Melvin D. Reuber, M.D., believed those chemicals most responsible for Kline's lymphoma were vinyl chloride and 2, 4-D. Reuber's opinion was based on studies published in medical journals.

In *Maughan*, the Tenth Circuit noted the issue of when a plaintiff knew or with reasonable diligence should have known of a cause of action is in question of fact for the jury. 758 F.2d at 1387. The court noted that plaintiffs' doctors told them the cause of their conditions were unknown. The court reasoned that such information may affect when a reasonably diligent plaintiff would have been put on notice to investigate and whether he then would have discovered the cause of action. The court then reversed the trial court, holding that the question of when the plaintiffs knew or should have known of the facts constituting their cause of action was a genuine issue of material fact and precluded a grant of summary judgment. 758 F.2d at 1389.

In the present case, although Kline admitted he did not ask his physician when he was diagnosed any questions regarding causation, Kline did ask his physician in 1990. The physician's answer, at least according to Kline's deposition, appears equivocal. It is difficult to discern whether that answer, had it been given in 1984, would have put Kline on notice to investigate further. See also *Williams v. Borden, Inc.*, 637 F.2d 731 (10th Cir. 1980) (Trial court's grant of summary judgment reversed. In applying Oklahoma laws, record did not sufficiently demonstrate under the standard for a summary judgment that the plaintiff knew, or as a reasonably prudent person should have known, that work exposure to polyvinyl chloride [PVC] caused plaintiff's condition. Statute of limitations had not commenced to run despite plaintiff's physician telling her that her illness "could be" related to her work-place exposure and despite plaintiff's own thoughts that work exposure could be the cause of illness. 637 F.2d at 736); *Stoleson v. United States*, 629 F.2d 1265 (7th Cir. 1980) (Plaintiff brought suit under Federal Tort Claims Act alleging her heart problems were the result of her working in an ammunition plant where she was exposed to nitroglycerin. Court of Appeals reversed district court's dismissal of suit finding that two-year statute of limitations under Tort Claims Act did not begin to run when claimant first suffered severe anginal attack, when she suspected that nitroglycerin was the culprit, or when she read union publications suggesting chronic nitroglycerin exposure as cause of angina. Statute only commenced to run when physician finally informed her of cause and effect relationship between her exposure to nitroglycerin and her heart problem. Based upon plaintiff's case, in part, plaintiff's physician published article, documenting for the first time the relationship between angina and chronic exposure to nitroglycerin; hence, there was no medical evidence of cause and effect at time of plaintiff's exposure.).

The foregoing seems to suggest that Kline's case should have gone to the jury. It is worth noting, however, that none of the foregoing authority involved cases where on-the-job warning signs specifically alerted employees to possible carcinogens. However,

Kline's testimony suggests that management (supervisors) downplayed the import of those signs.

Santa Fe cites numerous cases where a grant of summary judgment was upheld on appeal. A certain number of those cases dealt with issues similar to those present in this case, i.e., time-barred FELA claims and the discovery rule.

In *Fries v. Chicago & Northwestern Transp. Co.*, 909 F.2d 1092 (7th Cir. 1990), Fries (plaintiff) worked for C&NW as a machinist from 1969 to 1987. In 1980 or 1981, Fries first noticed a decline in his hearing and experienced tinnitus. Fries filed suit in 1987. The district court granted defendant's motion to dismiss. The Seventh Circuit affirmed, restating that the discovery rule "imposes on injured plaintiffs an affirmative duty to investigate the potential cause of his injury." 909 F.2d at 1095. "[A] plaintiff has a duty to investigate both the injury and any suspect causes." 909 F.2d at 1096. The court also relied on evidence that Fries knew, at a minimum, that work aggravated his hearing problem and that he could not ascribe his hearing loss to any other cause. 909 F.2d at 1096.

In *Bealer v. Missouri Pacific R. Co.*, 951 F.2d 38 (5th Cir. 1991), the court upheld the district court's decision that Bealer's (plaintiff) claim was time barred. Bealer claimed he did not fully realize the extent of his injury or its cause until he received, in 1986, a letter from his doctor describing the permanency of his hearing loss. The court determined, however, that Bealer was in possession of critical facts regarding his injury and causation as early as the 1970s. Bealer had answered a questionnaire in his claim form in which he indicated that as early as 1970 he was aware that loud noises might cause hearing problems and that in 1983 he first noticed a hearing problem. Bealer waited until 1989 to file suit. 951 F.2d at 39-40. The Fifth Circuit concluded that, because Bealer was aware of his injury and its causation (in 1979 he had been warned by his physician to wear earplugs on the job) more than three years before he filed suit, his claim was time barred.

See also *Townley v. Norfolk & Western Railway Company*, 887 F.2d 498 (4th Cir. 1989) (In a FELA case, plaintiff Townley brought action against employer to recover for black lung disease. The Court of Appeals upheld the district court's dismissal of Townley's claim, finding that evidence showed Townley suspected he suffered from black lung disease four years prior to being diagnosed with the disease and some seven years prior to filing his claim. The court noted that Townley, seven years prior to filing his claim, sought black lung disease benefits from his employer.).

The present case is a difficult one. Kline is a man with a high school education who worked for Santa Fe almost his entire adult life. It is undisputed he was exposed to numerous chemicals during his employment, some of them known to him as carcinogens. Kline admitted reading various warnings posted on rail cars regarding potentially hazardous substances. Apparently, Santa Fe supervisors encouraged employees to disregard those posted warnings. Kline complained about his exposure to substances. It is difficult to discern from Kline's testimony just what his fears were regarding those complaints, i.e., was he fearful of developing cancer? He testified he suffered from many bouts of intense itching of his arms. Kline spoke of coughing up blood following prolonged exposure to diesel exhaust. He also experienced swollen lymph glands and was treated for that. Kline stated his physicians told him the glands were swollen due to infection or inflammation.

Conversely, there appears to have been little, if any, common public knowledge of the link between specific substances Kline was exposed to (2, 4-D and 2, 4, 5-T) and non-Hodgkin's lymphoma. Kline's expert in testifying to the link relied on articles found in medical journals. Further, implicit in the newspaper article is that the link between exposure and this disease was newsworthy in 1990. Had Kline investigated to any degree in 1984 would he have determined causation?

Kline asserts on appeal that after he read the 1990 article he questioned his physician regarding possible causation. Kline's

appellate brief suggests the physician replied that he did not know. That does not appear to be an entirely accurate reflection of Kline's deposition on the issue. The testimony was:

> "Q. Have you asked your doctor, Dr. Sawkar, whether or not your exposure to chemicals at work have caused this lymphoma?
> "A. I asked him when I read that article.
> "Q. And what did he say?
> "A. He says it can cause it, but it may -- he said, "I don't know."
> "A. No."

However, since the testimony concerning the impact of the doctor's counsel is equivocal, summary judgment could only be justified on the basis of Kline's admitted knowledge of contact with known carcinogens. We believe it is. For the reasons set out above and those set out in the trial court's decision, we believe the claim is time barred.

> "The statute of limitations apportions the consequences of the flow of time. Until the victim has a reasonable opportunity to discover the cause, or a potential cause, the tortfeasor must bear the consequences. Once knowledge of the cause is available, any delay in pursuing the cause and developing a case rests with the would-be plaintiff." *Nemmers v. U.S.*, 795 F.2d 628, 632 (7th Cir. 1986).

Although this might be characterized as a harsh result, there exists ample precedent to support the district court's decision. It is clear that court did not take this issue lightly as evidenced by its 16-page memorandum opinion. The court did not err in granting summary judgment in favor of Santa Fe.

The next issue we must address is whether the statute of limitations was tolled by Santa Fe's alleged superior knowledge and alleged concealment of the cause of Kline's cancer.

Kline contends Santa Fe knew exposure to some of the chemicals to which he was exposed could cause lymphatic cancer. He contends Santa Fe concealed that knowledge from him, consequently inducing him not to act. He contends that because Santa Fe's concealment induced him not to act, the railroad may not rely upon the statute of limitations as a defense.

Santa Fe contends this issue was not properly brought before the trial court. Santa Fe's contention is clearly wrong. Kline raised this issue below, and the trial court even disposed of the issue in its memorandum opinion.

Kline's contention is belied by his admission that Santa Fe posted warnings regarding possible cancer-causing agents. The following excerpt from Kline's deposition is illustrative:

> "Q. Don't [the cars] have placards on them?
> "A. Some do. The vinyl chloride car, like I say, it has a permanent stencil that says it causes cancer, but its right up underneath the side sill, and it's -- you've got to be looking for it to find it. And we've been kind of indoctrinated not to read stencils, because if you don't know what it is, then you don't have so many problems."

It is clear that, despite Santa Fe's alleged efforts to "indoctrinate" its employees, Kline was aware of the cancer warning stenciled on the cars carrying vinyl chloride.

As the district court ruled, fraudulent concealment of a plaintiff's cause of action only tolls the statute of limitations "until a plaintiff has, or through due diligence should have had, notice of

his claim . . . [or] until [he] could have discovered 'facts giving notice of the particular cause of action . . ..'" *Hohri v. United States*, 782 F.2d 227, 246-47 (D.C. Cir. 1986), vacated on other grounds 482 U.S. 64 (1987).

It appears that in light of the "discovery rule" discussed above, and Kline's admitted knowledge of the cancer warnings, the district court properly found the statute of limitations had not tolled.

The final question is whether Kline's on-the-job exposure to carcinogenic substances less than three years prior to filing his claim tolled the statute of limitations.

Kline was diagnosed with cancer in 1984. He worked at Santa Fe until September 6, 1988. He filed suit in August 1991, less than three years after his last day of work. Kline testified he was exposed to various chemicals and carcinogens through his last day of work. He contends that the theory of continuing tort applies to this case. Under that theory, where an injury is caused by continuing or repeated acts, "the statute of limitations may not begin to run even when the tort is complete." *Fletcher v. Union Pac. R. Co.*, 621 F.2d 902, 908 (8th Cir. 1980), cert. denied 449 U.S. 1110 (1981). Consequently, the FELA statute of limitations was tolled until Kline stopped working. Kline contends he filed his petition within the statutory time frame.

Kline contends that *Fowkes v. Pennsylvania Railroad Company*, 264 F.2d 397 (3d Cir. 1959), provides the appropriate rule to follow. In *Fowkes* (a FELA case), the employee brought an action against his employer for traumatic arthritis which resulted from a continuous series of small jolting impacts between 1924 and September 1952 caused by a defective air hammer. It was undisputed that the jolting caused intermittent pain for about two years before September 1952. 264 F.2d at 398.

The court noted no one incident could realistically be identified as the cause of significant harm. The court followed Pennsylvania case law and determined that in a master/servant relationship where the negligence is continuous "'until the cumulative effect produces disability . . . the master's failure to perform his duty . . . is regarded as a single wrong continuing so long as the employment continues.'" The court concluded that the statute commenced to run only when the employment terminates. 264 F.2d at 399.

In the present case, the district court rejected the *Fowkes* and *Fletcher* rationale and relied upon *Kichline v. Consolidated Rail Corp.*, 800 F.2d 356 (3d Cir. 1986). In *Kichline* the court held that the employee's primary claim was barred by the FELA statute of limitations. The plaintiff filed suit more than three years after learning that his pulmonary disease had been aggravated by exposure to diesel fumes in the work place. Plaintiff continued to work even though he was aware of the harmful effect of the fumes. Plaintiff contended that the cause of action did not accrue until his retirement when exposure to the harmful substance ceased. 800 F.2d at 357. The court held that because plaintiff had knowledge of his injury and its cause more than three years before filing suit, plaintiff had no claim for physical injuries occurring more than three years prior to filing suit. 800 F.2d at 361.

Kline contends that, in the present case, the court erred in relying on *Kichline* because Kline did not have knowledge of the cause of his illness three years before filing suit. Kline, however, ignores the bulk of the district court's opinion. The court specifically found that had Kline fulfilled his duty to diligently investigate the cause of his illness, Kline would have known of the possible cause. "*Fowkes* can be fairly read as implying that had identification of the injury and its cause occurred before employment terminated, the discovery . . . rather than the cessation of work would have marked the beginning of the limitations period." 800 F.2d at 359.

The district court's decision is well reasoned. Although the result is unfortunate, there is no doubt the statute of limitations had run prior to the filing of this action.

Affirmed.

APPENDIX C

IN THE DISTRICT COURT OF WYANDOTTE COUNTY, KANSAS
CIVIL DEPARTMENT

BURL KLINE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 91 C 3528
	)	
ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,	)	
	)	
	)	
Defendant.	)	

MEMORANDUM DECISION

This court heard final argument on defendant's motion for summary judgment on August 6, 1992. The issues are (1) whether the statute of limitations ran on plaintiff's cause of action; (2) whether the limitation issue should be decided by a jury; (3) whether defendant is equitably estopped from relying on the statute of limitations; and (4) whether the statute of limitations was tolled under the "continuing tort" theory.

The following uncontroverted facts are found in the discovery record in this case, copies of which are attached hereto:

1. Plaintiff worked for defendant almost continuously from 1956 to September 6, 1988.

2. Throughout his employment, plaintiff was exposed to vinyl chloride. There was a cloud of it over everything, including his skin. This occurred about every other day. Freight cars carrying vinyl chloride had small stencils that warned the chemical was a "known cancer causing substance" or a "known cancer causing suspect agent or agent."

3. On at least one occasion plaintiff worked on a car containing radioactive material for almost four hours after his supervisor pulled a placard off the car and after plaintiff first refused to work on the car.

4. Plaintiff welded on a car containing naptha after first refusing to do so because his supervisor told him he would get someone else to weld.

5. Plaintiff knew what the cars contained because he always liked to check with the 396 clerk before he started cutting and welding.

6. Plaintiff was exposed on numerous occasions to naptha and weedkiller sprays. The cars' runningboards would be saturated and the chemicals soaked into the leather gloves that plaintiff had to wear for three or four weeks.

7. On a number of times, plaintiff complained about working around chemicals at safety meetings because he didn't know which chemicals were bad and which weren't. He specifically complained about working around vinyl chloride, herbicides, pesticides, carbon block and silica sand.

8. Employees "were kind of indoctrinated not to read stencils, because if you don't know what it is, then you don't have so may problems . . . the supervisors' job I guess is to get the cars worked, and if you question anyone about these chemicals, they -- it's just a big hassle, and you end up doing it anyway. You end up getting in the car and cleaning it out. And if you know what it is it's probably worse for you than if you don't know what it is."

9. Although plaintiff contends a safety inspector told him vinyl chloride was not bad unless it was either in a

gas form or heated and melted, he later testified: "But then he told me after we had pretty good discussion that maybe the stencil did mean something . . . I don't know what he did with it. It was about time to go home."

10. During his employment with defendant there were numerous occasions when plaintiff experienced illnesses. On approximately 100 occasions he suffered severe itching of the arms after being exposed to vinyl chloride. He coughed up blood when he was around heaters that burned diesel fuel. He had bad headaches when he was exposed to styrene which would go away after he left the workplace. The lymph glands in his neck swelled occasionally and sometimes lasted a week or two beginning in the late 1960's or early 1970's.

11. Plaintiff was diagnosed as having a malignant condition known as non-Hodgkin's lymphoma in 1984. The first symptom of the lymphoma was from a swollen lymph node in his neck which was removed and found to be malignant.

12. Plaintiff did not inquire of his treating physician, or anyone else, as to the cause of his non-Hodgkin's lymphoma until he read an article in the Kansas City Star on June 27, 1990, which described farmers who contracted non-Hodgkin's lymphoma after exposure to 2, 4-D and 2, 4, 5-T, commonly known as Agent Orange. After reading the Star article, plaintiff asked his doctor if his exposure to chemicals at work caused his lymphoma. His doctor said it could cause it but he didn't know if it did.

13. Plaintiff's expert, Melvin D. Reuber, M.D., testified that exposure to a combination of chemicals caused plaintiff's non-Hodgkin's lymphoma. The main ones were vinyl chloride, Agent Orange, dioxin, and diesel exhaust. Plaintiff's chemical exposure was considerable and was dangerous because he was getting it dermally

through the skin and was breathing it in. Dr. Reuber had known about non-Hodgkin's lymphoma causation from chemical exposure long before he got involved in this case. The literature is voluminous, especially on chemicals like PCB's, vinyl chloride and dioxin.

Summary judgment is proper where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The trial court is required to resolve all facts and references which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought. When the affirmative defense of the statute of limitations is asserted, summary judgment may be proper when there is no dispute or genuine issue as to the time when the statute commenced to run. But in a tort action where the evidence is in dispute as to when substantial injury first appears or becomes reasonably ascertainable, the issue is for determination by the trier of fact. *Gilger v. Lee Constr., Inc.*, 249 Kan. 307, Syl. 1, 2, ___ P.2d ___ (1991).

Plaintiff was diagnosed as having non-Hodgkin's lymphoma in 1984. He filed this lawsuit on August 13, 1991. The injury for which plaintiff is seeking to hold defendant liable under the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51, et seq., is solely for the non-Hodgkin's lymphoma which he claims he contracted as a result of continuous exposure to hazardous chemicals in the workplace throughout his years of employment with defendant.

In FELA occupational disease cases, a "discovery" rule has evolved. The genesis of the discovery rule in FELA actions is the 1949 decision of the United States Supreme Court in *Urie v. Thompson*, 337 U.S. 163, 69 S.Ct. 1018, 93 L.Ed. 1282 (1949). There the court held that the disease accrued on the date the injury manifested itself. The *Urie* rule was refined in *United States v. Kubrick*, 444 U.S. 111, 100 S.Ct. 352, 62 L.Ed. 2d 259 (1979),

wherein the court held that the plaintiff's claim accrued at the time he first became armed with the critical facts of both the existence and cause of his injury. See also *Albertson v. T. J. Stevenson & Co., Inc.*, 749 F.2d 223 (5th Cir. 1984); *Dubose v. Kansas City Southern Ry. Co.*, 729 F.2d 1026 (5th Cir. 1984). Kansas also recognized the discovery rule in tort actions. *Pancake House, Inc. v. Redmond*, 239 Kan. 83, 716 P.2d 575 (1986); *Knight v. Myers*, 12 Kan. App.2d 469, 748 P.2d 896 (1988).

As to the issue of causation, the statute of limitations begins to run either when the tort claimant knows of the tortuous acts or when a reasonably diligent person (in the tort claimant's position) reacting to any suspicious circumstances of which he might have been aware would have discovered causation - whichever comes first. *Drazen v. United States*, 762 F.2d 56, 59 (7th Cir. 1985). In *Nemmers v. U.S.*, 795 F.2d 628, 631-32 (7th Cir. 1986), the court explained this objective test:

> "Our question, then, is whether the running of the statute depends on the plaintiff's personal knowledge and reactions or whether it depends on the reactions of the objective, 'reasonable man.' The answer is the latter, an answer reflected in the formula 'knew or should have known." The first part is actual knowledge, the second is an objective inquiry. A person 'should have known' enough when a reasonable man - 'a reasonably diligent person (in the tort claimant's position)' *Drazen*, 762 F.2d at 59 - would have known enough and what the reasonable man had to know is not a certain cause - for 'truth' is not within human reach, and even after trial there may be much uncertainty - but a potential cause . . .
>
> "The principle that the statute limitations starts to run when a reasonable person would know enough to prompt a deeper inquiry into a potential

> cause comes from the function of the statute of limitations. It is to bring cases to the legal system before memories fade and evidence disappears . . . The statute of limitations apportions consequences of the flow of time. Until the victim has a reasonable opportunity to discover the cause, or a potential cause, the tortfeasor must bear the consequences. Once knowledge of the cause is available, any delay in pursuing the cause and developing a case rests with the would be plaintiff. . ."

FELA cases must be commenced within three years from the date the cause of action accrued. 45 U.S.C. § 56. In the instant case, plaintiff admittedly knew in 1984 he was suffering from the disease for which he is making claim. The only question, therefore, is when did plaintiff realize, or by reasonable diligence should have ascertained, that the non-Hodgkin's lymphoma was caused by the tortuous act of defendant?

The federal decisions have long held a would be plaintiff, armed with knowledge of a potential cause of his injury, has an affirmative duty to investigate. In *United States v. Kubrick*, 100 S.Ct. at 359-60, the court said:

> "We thus cannot hold that Congress intended that 'accrual' of a claim must await awareness by the plaintiff that his injury was negligently inflicted. A plaintiff such as Kubrick, armed with the facts about the harm done to him, can protect himself by seeking advice in the medical and legal community. To excuse himself from promptly doing so by postponing the accrual of his claim would determine the purpose of the limitation statute, which is to require the reasonably diligent presentation of tort claims . . . But however or even whether he is advised, the putative malpractice plaintiff must determine within the period of

> limitation whether to sue or not, which is precisely the judgment that other tort claimants must make. If he fails to bring suit because he is incompetently or mistakenly told that he does not have a case, we discern no sound reason for visiting the consequences of such error on the defendant by delaying the accrual of the claim until the plaintiff is otherwise informed . . ."

In a recent FELA action, *Fries v. Chicago & Northwestern Transp. Co.*, 909 F.2d 1092, 1095 (7th Cir. 1990) the court reiterated the plaintiff's duty to investigate potential causes of his injury of which he knows or should have known:

> ". . . Both components require an objective inquiry into when the plaintiff knew or should have known, in the exercise of reasonable diligence, the essential facts of injury and cause . . . Moreover, the injured plaintiff need not be certain which but only need to know or have reason to know of a potential cause. *Nemmers*, at 631, 32; *Drazen*, 762 F.2d at 59. That this rule imposes on injured plaintiffs an affirmative duty to investigate the potential cause of his injury has not been lost on the courts. However, to apply any other rule would thwart the purposes of the repose statutes which are designed to apportion the consequences of time between plaintiff and defendant."

See also *Albert v. Maine Cent. R. Co.*, 905 F.2d 541 (1st Cir. 1990); *Kechline v. Consolidated Rail Corp.*, 800 F.2d 356 (3rd Cir. 1986); *Fletcher v. Union Pacific R. R. Co.*, 621 F.2d 902 (8th Cir. 1980).

Although plaintiff herein claims he was unaware that the chemicals he was exposed to during his years of employment could cause non-Hodgkin's lymphoma until he read the article in the

Kansas City Star, that is only the first of the two-part examination this court must make. The formula is "knew or should have known." The second part of the formula requires an objective inquiry into when a reasonably diligent person in plaintiff's position should have realized a potential relationship between his injury and his long-time exposure to hazardous chemicals. If plaintiff had reason to know of a causal connection between his injury and chemical exposure in 1984, when he was diagnosed as having non-Hodgkin's lymphoma, then he had an affirmative duty to investigate by seeking advice in the medical and legal community.

What critical facts were known to plaintiff when he was told by his doctor in 1984 that he had non-Hodgkin's lymphoma? He actually possessed the same knowledge then as he did in 1990 except for reading the Kansas City Star article. He knew he had been continuously exposed to hazardous chemicals at his workplace over a number of years, including chemicals that warned of their cancer causing potential. Plaintiff was admittedly fearful of working around the chemicals and complained about the potential danger at a number of safety meetings. He knew his supervisors were unconcerned about his safety complaints because they only wanted the cars worked on and back in service. He also knew he had experienced approximately 100 incidents of severe itching of the arms after being exposed to vinyl chloride, coughed up blood when he was around heaters that burned diesel fuel, and had bad headaches when he was exposed to styrene which would go away when he left the workplace. The lymph glands in plaintiff's neck swelled occasionally, sometimes lasting a week or two, and it was from the removal of a swollen lymph node in his neck that the lymphoma was discovered.

If there is an affirmative duty to investigate a known potential cause of an occupational disease, it is difficult to imagine a would be plaintiff possessing any more critical facts than plaintiff possessed in 1984. Surely a reasonably diligent man in plaintiff's position would have made some inquiry into the cause of his illness.

Plaintiff contends that if had inquired of his treating physician in 1984 as to the cause of his cancer, his physician would have told him, as he did in 1990, that he did not know whether exposure to workplace chemicals caused the illness - only that it was a possibility. The point is, his physician would not have told him there was no connection between his workplace exposure and his illness, a statement plaintiff might have been justified in relying upon. If he had been told in 1984 that causation was only a possibility, he would still have had a duty to investigate further into causation, including seeking advice in the medical and legal community. There is no reason to believe plaintiff's attorney and expert were not available in 1984 as they were in 1990 or 1991 and, as stated in *Kubrick*, if he had sought and received incompetent or mistaken advice, the consequences of such error should not be visited on the defendant by delaying the accrual of plaintiff's claim until he is otherwise informed. Once armed with the critical facts of a potential cause of a known injury, as the plaintiff was in 1984, the statute of limitations starts to run and any delay in pursuing the cause and developing the case rests with the would be plaintiff.

Plaintiff has cited several cases in support of his contention that the statute of limitation defense should be resolved by the trier of facts. I believe his reliance is misplaced. In *Kracium v. Owen-Corning Fiberglas Corp.* 895 F.2d 444 (8th Cir. 1990) the issue was when did plaintiffs know they had contracted asbestosis from long-time exposure to asbestos dust. The court noted the difficulty to diagnose the disease in the early stage and that people differ markedly in their response to asbestos fibers which can cause a broad range of clinical disorders, most of which have a long latency period. Although the plaintiffs knew of the hazards of asbestos, the court held that general knowledge of the hazard is far different from knowledge that an individual has contracted a disease caused by the hazard. None of the plaintiffs experienced any significant physical symptoms prior to the limitation period and some were told by their doctors that they had nothing to worry about. In *Chamness by and through Chamness v. U.S.*, 835 F.2d 1350 (1988), the issue was whether plaintiff exercised due diligence in discovering causal connection between injury and care received during child labor.

Plaintiff consulted several doctors who could not explain the source of her problems. Suit was delayed until plaintiff saw a 20/20 program and a new doctor concluded there was malpractice. Court held that although statute of limitations is not tolled by ignorance from a lack of diligence, a plaintiff seeking to understand the cause of an injury may reasonably rely on advice and assurances by doctors. In *Smith v. States Marine Intern, Inc.*, 864 F.2d 410 (5th Cir. 1989) plaintiff suffered a loss of hearing from repeated exposure to loud noises in an engine room. Plaintiff testified he thought his hearing loss was due to a natural aging process. Court held that plaintiff's hearing loss was a slow, progressive disability and there was no evidence that plaintiff attributed or even suspected its cause was related to his time spent as an engineer. In *Williams v. Borden, Inc.*, 637 F.2d 731 (10th Cir. 1980), plaintiff sustained a "meat cutters" syndrome, a chronic obstructive pulmonary disease from fumes during meat wrapping. Plaintiff sought medical advice as to whether her asthmatic condition was caused by her working conditions. Her doctor could only tell her it was a possibility. There was no definite medical link between plaintiff's illness and the polyvinyl chloride fumes until an article was written by three doctors for the Journal of the American Medical Association, which was the first time the phenomenon had been reported in the medical literature. The ruling in *Stoleson v. United States*, 629 F.2d 1265 (7th Cir. 1980), was similar to *Williams*. There plaintiff developed heart problems as a result of being exposed to nitroglycerin in an ammunitions plant. Both her doctor and the company's in-house physician told her that exposure to nitroglycerin was not the cause of her heart problems. Delay in filing suit was justified by her reliance on their medical advice which medical science recognized at the time given. In *Kestner v. Missouri Pacific R. Co.*, 785 S.W.2d 646 (Mo.App. 1990), the court noted plaintiff was not told by any doctor that his hearing loss was caused by exposure to loud noises until 1988. One even told him his hearing loss would improve. The court, therefore, held the trier of fact should decide when plaintiff knew or should have known the cause of his hearing loss.

Unlike the cases cited above, there is no genuine issue as to any material fact in the instant case. Plaintiff was given no assurances his non-Hodgkin's lymphoma would improve. He knew of the nature and extent of his exposure to hazardous chemicals which should have caused a reasonably diligent person to suspect that such exposure was a potential cause of his disease. Plaintiff had a duty to investigate potential causes and he admittedly failed to ask anyone, including his treating physician, whether there was a causal connection between the exposure and his illness. An investigation would have led to a discovery of causation because medical science recognized a causal connection between chemical exposure and non-Hodgkin's lymphoma long before the filing of plaintiff's action.

Plaintiff contends the statute of limitations was tolled under the "continuing tort" theory. Plaintiff did not retire from the railroad until September 6, 1988, and allegedly was exposed to hazardous chemicals until his retirement. *Fletcher v. Union Pac. R. Co.*, 621 F.2d 902 (8th Cir. 1980), and some earlier cases cited therein, support plaintiff's position.

I believe a better reasoned rule is found in *Kichline v. Consolidated Rail Corp.*, 800 F.2d 356 (3rd Cir. 1986). There a railroad employee continued to work after being told by his doctor to stay away from diesel fumes because it was aggravating his pulmonary disease. Suit was filed more than three years after learning his condition would be aggravated by continued exposure. In ruling that the continuing tort theory was not applicable, the court held that although "the continuing violation concept implies that the liability feature of the claim has not become stale, the same cannot be said of the damages phase." In FELA cases the running of the statute of limitations affects not only the remedy but eliminates the cause of action itself. On discovering an injury and its cause, a claimant must timely choose to sue or foregoing that remedy. The court held, however, that the statute of limitations did not extinguish plaintiff's claim for aggravation which occurred within three years of filing suit. The fact that plaintiff was aware of the harmful effects of diesel fumes would go to his contributory

negligence but might not bar his claim for alleged aggravation during that period. Plaintiff could not, however, recover damages for any injury or aggravation which occurred more than three years before suit was filed. *Kichline* is more in accord with Kansas decisions on continuing torts than is *Fletcher*. See *McCoy v. Wesley Hospital & Nurse Training School*, 188 Kan. 325, 362 P.2d 841 (1961).

The defendant herein is not equitably estopped from asserting the statute of limitations as a defense. Fraudulent concealment of a plaintiff's cause of action only tolls the statute of limitations until the plaintiff has, or through due diligence should have had, notice of his claim or until he could have discovered facts giving notice to the particular cause of action. *Hohri v. United States*, 782 F.2d 227, 246-47 (D.C. Cir. 1986). Likewise, a railroad is not estopped where the employee did not in fact rely on its misrepresentations. *Fletcher v. Union Pac. R. Co.*, supra.

Plaintiff finally asserts he should be allowed to pursue damages for aggravation of his injury caused by exposure to hazardous chemicals within three years of filing his action against defendant. This would normally be permissible. *Kichline v. Consolidated Rail Corp.*, supra. Plaintiff retired on September 6, 1988, and was not exposed to workplace chemicals after that date. He filed the within action on August 13, 1991. His actionable exposure would be for the period from August 13 to September 6, 1988, a total of 17 working days.

Plaintiff has failed to suggest how he would prove that the 17 days of employment aggravated his non-Hodgkin's lymphoma or, more importantly, how a jury could reasonably measure damages for any such aggravation. Damages may not be based on conjecture or speculation. *Morris v. Francisco*, 238 Kan. 71, Syl. 3, 708 P.2d 498 (1985):

> "In negligence action, recovery may be had only where there is evidence showing with reasonable certainty the damage was sustained as a result of

> the complained-of negligence. Recovery may not be had where the alleged damages are too conjectural or speculative to form a measurement. To warrant recovery of damages, therefore, there must be some reasonable basis for computation which will enable the trier of fact to arrive at an approximate estimate of the amount of loss."

Defendant's motion for summary judgment is sustained. Court costs are assessed against the cost deposit.

This Memorandum Decision shall constitute a journal entry of judgment and shall be final upon filing with the clerk of the court. Entered and filed this 1st day of September, 1992.

/s/_____
William M. Cook
Division 2

cc: Jon G. Carlson
Richard F. Lombardo
Michelle M. Suter
William P. Coates, Jr.
Paul R. Hoferer